No. 92-1243

In The

Supreme Court of the United States

October Term, 1992

GERALD BENECKE, Individually, and t/a TCB TOWING,

Petitioner,

vs.

BOROUGH OF FORT LEE, SALVATORE CARERI, JOSEPH ZEVITZ, CAROL KOHOUT and JOHN DOES (1-50),

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether each and every technical deficiency in a summons issued for a violation of a quasi-criminal municipal ordinance constitutes a claim under 42 U.S.C. § 1983.

LIST OF PARTIES

Petitioner, Gerald Benecke, Plaintiff-Appellant-Petitioner, in the proceedings before the Supreme Court of New Jersey.

Respondents Deputy Chief Salvatore Careri, Detective Sergeant, Joseph Zevitz and Borough Administrator Carol Kohout, Defendants-Respondents-Respondents in the proceedings before the Supreme Court of New Jersey .

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Borough of Fort Lee, Deputy Chief Salvatore Careri, Detective Sergeant Joseph Zevitz and Borough Administrator Carol Kohout, respectfully request that this Court deny the petition for certiorari seeking to review the Supreme Court of New Jersey's denial of a petition for certification dated October 20, 1992, the order granting respondents summary

judgment of the Superior Court of New Jersey, Law Division, Bergen County, entered June 4, 1991, which is unreported and is printed in petitioner's Appendix G, and the opinion of the Superior Court of New Jersey, Appellate Division, affirming summary judgment being granted to respondents, decided July 21, 1992, which is unreported and is printed in the petitioner's Appendix B, 3a.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The Borough of Fort Lee, pursuant to its police powers, issued as part of its general ordinances, a procedure for applying for a towing license within the Borough of Fort Lee (Appendix A, *infra*, 1a).[1]

Pursuant to the ordinance, an individual seeking to obtain a towing license within the Borough of Fort Lee must produce proof of automobile and garage keeper liability insurance.[2]

The petitioner submitted an incomplete application for a license for the towing year 1988 on November 23, 1987 (App. B, 26a). The application was deficient in that it failed to provide a registration card for the tow truck, failed to provide garage keeper

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1. Petitioner conceded before the trial court that the Borough of Fort Lee Ordinance was a valid exercise of Fort Lee police powers and that the petitioner was not challenging the ordinance (App. G, 44a).

2. Other documents are required, including proof of vehicle ownership, registration, proof of property ownership or a lease as to where the vehicles are to be towed, as well as a valid certificate of occupancy and other incidental documents to ensure the safeguard of property which is towed by licensee.

liability insurance policies, failed to provide a certificate of occupancy, as well as the other essential requirements for applying for a license. Petitioner was informed of these deficiencies at the time the application was submitted, and again on February 3, 1988 (App. C, 30a). No permit was issued to petitioner for the year 1988 as no complete application was received. Petitioner towed within the Borough of Fort Lee during said time period despite the fact that he did not have a license. Each and every time the petitioner towed a vehicle, he contacted the Borough of Fort Lee Police Department and informed them of the tow. Each and every time petitioner informed Fort Lee Police Department of same, a summons was issued. *None of the individual respondents signed any of the summonses which are at issue here and none of the respondents participated in any way with the issuance of said summonses.*

The manner in which the Borough of Fort Lee issued summonses for municipal ordinances was governed by the municipal court judge, Judge DeSheplo. Judge DeSheplo advised the Borough of Fort Lee that summonses for violation of borough ordinances were to be handled pursuant to N.J.S.A. 2A:8-27. Under said statute, Judge DeSheplo stated that police officers could administer the oath on any of these complaints (App. D, 32a).[3]

Thirty-five summonses were dismissed by the Bogota Municipal Court as being defective pursuant to the New Jersey Appellate Court's holding in *State v. Ross*, 189 N.J. Super. 67 (App. Div. 1983).[4] Fort Lee sought clarification from Judge DeSheplo as

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3. It should be noted that petitioner has not named as defendants any of the officers who signed or issued the summonses.

4. Petitioner alleges that the municipal court held that respondents violated petitioner's right to procedural due process. *See* Petitioner's Brief at pp. 3-4. Respondents contest this statement as the municipal court only found that the summons issued were constitutionally defective, which required a dismissal. No judicial determination as to a procedural due process violation was made.

to which procedure should be followed. Judge DeSheplo confirmed that the way the summonses were issued was permissible; however, before proceeding to issue any new summonses, the Borough of Fort Lee also sought advice from counsel. Counsel for the borough directed that the Police Department issue the remaining summonses in a manner consistent with the Bogota Municipal Court's directive. The remaining summonses were served in this manner (App. E, 34a).

Prior to a judicial determination on any of the summonses, petitioner's application for a 1989 towing license was received. Prior to acting, the Mayor and Council again sought advice of the borough attorney. The Mayor and Council were advised that the petitioner had possibly violated the municipal ordinance 516 times, and that a towing license should not be granted (App. F, 35a). The Mayor and Council then denied petitioner's application for the towing year 1989, and petitioner was informed of same.[5]

Petitioner seeks review from the United States Supreme Court alleging that every quasi-criminal summons issued for a violation of a municipal ordinance, traffic offense, etc., requires that a judicial determination be made prior to the issuance of said summons that probable cause existed. The petitioner alleges that

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5. Under the Towing Ordinance of the Borough of Fort Lee, petitioner could have appealed the denial of the license as set forth by the municipal ordinance. Pursuant to Section 4:11-2 of the Ordinance,

> In the event of a denial, the applicant shall forthwith be notified thereof in writing, which shall specify the reasons for the denial. After receipt of such notification, the applicant shall have 10 days in which to make a written request to the Borough Clerk, for a hearing before the Mayor and Council.

Petitioner never made a request for a hearing.

respondents each contributed to the violation of the petitioner's constitutional civil rights by creating false complaints, directing and filing of false complaints, directing and filing of unconstitutional complaints, and otherwise engaging in a course of conduct knowing full well that the sole purpose was to harm the petitioner and his business.

Absolutely no evidence was presented to the trial court of any such conspiracy. Counsel for petitioner conceded that respondents believed petitioner had violated the ordinance. "I am not suggesting that they did not believe that Mr. Benecke may have violated the Ordinance." (App. G, 52a).

The petitioner seeks to have the Supreme Court of the United States rule that every time a police officer fails to sign a summons or fails to secure the appropriate signature, a violation pursuant to 42 U.S.C. § 1983 takes place.

At no time prior to the Bogota Municipal Court's ruling of February 7, 1989, and the Palisades Park Court's ruling of July 18, 1989, was there any judicial determination as to the validity of the issuance of the summonses and at all times prior to said dates, the police officers of the Borough of Fort Lee were executing and issuing summonses consistent with the towing ordinance and Judge DeSheplo's directive.

The trial court, taking the facts most favorable to the petitioner, ruled that there was no deprivation of any right or privilege. In regard to the issuance of the summonses, the trial court correctly held that the nature of the defect in the issuance of the summonses did not constitute a violation of petitioner's due process rights and did not give rise to a claim under 42 U.S.C. § 1983. Additionally, the trial court found that even if these respondents had issued the summonses, a qualified immunity existed.

REASONS FOR DENYING THE WRIT

I.

PETITIONER STATES NO BASIS FOR WHICH CERTIORARI SHOULD BE GRANTED.

In determining whether a procedure satisfies the demands of due process, a court must balance the private interest affected, the risk of an erroneous deprivation of that interest, and the probable value of additional procedural safeguards and the government's interest, including the function involved and the burdens that additional procedural requirements would place on the State. *Glatz v. Kort*, 807 F.2d 1514 (10th Cir. 1986).

The New Jersey Appellate Division, in *State v. Ross*, 189 N.J. Super. 67 (App. Div. 1983), held that when a private citizen in a matter involving a non-traffic municipal offense seeks to have a summons issued, the issuance may not take place unless there is a finding of probable cause by a judge, clerk or deputy clerk. In 1987, the New Jersey Appellate Division extended their holding requiring a probable cause hearing for a complaint signed by a police officer when a summons had already been issued for the violation of an anti-noise ordinance. *See State v. Salzman*, 228 N.J. Super. 109 (App. Div. 1987). In 1989, the New Jersey Supreme Court held that no probable cause determination need be made in motor vehicle offenses or related matters. *See State v. Gonzalez*, 114 N.J. 592 (1989). The *Gonzalez* court made no determination as to the applicability of their holding to non-traffic municipal offenses.

The determination as to what process is due necessitates an analysis of the underlying factors and circumstances, including not only the threat to a suspect's liberty, but also the hinderance of law enforcement the process would create. *State v. Gonzalez*, 114 N.J.

at 604, *citing Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

> Without the risk of detention, a suspect's interest in liberty and freedom from unreasonable prosecution are still paramount, but the procedures required to protect those interests need not be as extreme or absolute because the threat to those interests are not as great.

State v. Gonzalez, 114 N.J. at 604.

As noted in *Gerstein v. Pugh*, 420 U.S. 103 (1975), when a citizen is not subject to arrest or detention, as in the case with a summons, there is no constitutional requirement that a magistrate determine probable cause. A probable cause determination is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. *United States v. Birkenstock*, 823 F.2d 1026 (7th Cir. 1987); *United States v. Bohrer*, 807 F.2d 159 (10th Cir. 1986).

The New Jersey Supreme Court ruling in *State v. Gonzalez* involved a much more serious offense than that at issue before this Honorable Court. Specifically, the New Jersey Supreme Court ruled that there was no need for independent probable cause determination for a claim for driving while intoxicated, as well as possession of a controlled dangerous substance in a motor vehicle. The decision in *State v. Gonzalez* applied to all traffic offenses as defined under New Jersey Court Rule 7:6-1 involving the violation of statues or ordinances relating to the operation or use of motor vehicles.

Technical omissions, such as the failure of an issuing police officer to sign a summons or to obtain a signature, do not constitute a violation of a petitioner's due process rights. *See State v.*

Brennan, 229 N.J. Super. 342 (App. Div. 1988).

In the instant matter, the petitioner did not have a license to tow in the Borough of Fort Lee. Each and every time the petitioner towed a vehicle within the Borough of Fort Lee, the petitioner himself contacted the Borough of Fort Lee Police and advised them of the fact that he in fact had towed a vehicle. The requirement of procedural due process applies only to the deprivation of interests encompassed by due process protections of liberty and property. Probable cause existed in the issuance of the summonses based upon the petitioner's own actions. Petitioner was aware of the charges against him. Due process requires only that a person have a meaningful opportunity to present his claims. *American National Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987).

In order to establish a denial of procedural due process, a party must show substantial prejudice. *Keough v. Tate County Board of Education*, 748 F.2d 1077 (5th Cir. 1984). In the instant matter, there was no deprivation of life, liberty or property. In determining whether a state action has violated an individual's right to due process, the court must address two questions. First, whether the state's actions deprive the individual of a protected interest, namely life, liberty or property and, upon the finding of such a deprivation, the court must determine if the state procedure available for challenging the deprivations satisfy the requirements of due process. *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984).

In the instant matter, summonses were issued after the petitioner advised the police of his towing action. The state procedure available to the petitioner for challenging the issue of the summons was at the municipal court level. The petitioner was successful at the municipal court level. There was no deprivation of his procedural due process rights. Even if we were to assume that the Borough of Fort Lee did not comply with the State of New Jersey's own procedural requirements, this is not in itself enough

to establish a violation of due process. *See Bills v. Henderson*, 631 F.2d 1287 (6th Cir. 1980).

Petitioner bases his argument on the case of *Carey v. Piphus*, 435 U.S. 247, 266 (1978). In *Carey*, it was conceded by the parties that a 42 U.S.C. § 1983 procedural due process violation existed. Respondents made no concession in this case. Additionally, in *Carey*, the petitioner was denied the basic right of review. In *Carey* there was no forum for the petitioner to present his claim. In the instant matter, both in the denial of the towing license and in the municipal summonses, petitioner had a right of redress which, in the case of the towing license, was ignored. In the case of the summonses, there was no threat to the petitioner's freedom and he was presented with a forum to present his claim. While the failure of an officer to sign or to obtain a proper signature on a summons may render the summons defective, such an error does not constitute a violation of a person's due process rights. The Bogota Court did not find that the appellant's procedural due process rights were violated, but rather that there was a procedural deficiency in the summons which rendered said summonses defective. Even if petitioner's procedural due process rights were violated, negligence is not enough under 42 U.S.C. § 1983. *See Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988), *reh'g denied en banc*, 851 F.2d 434 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 956 (1988). Simply put, not every procedural error constitutes a violation of one's due process rights and gives rise to a 42 U.S.C. § 1983 claim.

II.

THE DOCTRINE OF *RESPONDEAT SUPERIOR* DOES NOT APPLY TO CLAIMS UNDER 42 U.S.C. § 1983.

The petitioner names as the respondent the Borough of Fort Lee. As a general principal, a municipality is not liable under 42 U.S.C. § 1983 for the actions of its employees. A municipality can

only be held liable under 42 U.S.C. § 1983 if the alleged unconstitutional act was committed by an official high enough in the government so that as his or her actions can be said to represent a governmental decision.[6] (App. G, 45a). *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). The petitioner does not allege an unconstitutional municipal policy. Specifically, the petitioner was asked by the trial court,

> Question: And are you saying there is an unconstitutional municipal policy, Mr. Pollinger?
>
> Answer: I am not saying that there is an unconstitutional municipal policy.

(App. G. 45a).

As no allegation of an unconstitutional municipal policy is being made, the Borough of Fort Lee cannot be liable in this matter. As none of the respondents issued the summons in question and as no due process violation took place, no claim under 42 U.S.C. § 1983 took place. A municipality cannot be held liable under a theory of *respondeat superior.*

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6. Petitioner conceded that there was no unconstitutional municipal policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari of Gerald Benecke should be denied.

Respectfully submitted,

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APPENDIX A — BOROUGH OF FORT LEE MUNICIPAL ORDINANCE CHAPTER 4-11

4-11 WRECKERS AND TOWING SERVICE.

4-11.1 Definitions. As used in this section.

a. "Wrecker" shall mean a motor vehicle employed for the purpose of towing, transporting, conveying or removing any other motor vehicle which is unable to be operated under its own power for which service a charge or fee is exacted.

b. "Person" shall mean and include any natural person, partnership, corporation or association.

c. "New license" shall mean and be defined as a license issued to a licensee who did not hold a wrecking and towing license in the borough during 1976.

4-11.2 License and Registration Required.

a. No person shall operate any wrecker or conduct any wrecker service within the borough without first having obtained a license therefor.

b. No employee or agent of a person conducting any wrecker service within the borough, or such person, shall operate any wrecker within the Borough of Fort Lee without first having been registered as provided herein.

4-11.3 Application for License; Information Required. The application for a license as required by the preceding section shall be made to the borough clerk on the prescribed form and shall accurately specify the following information, the truth of which shall be sworn to by the applicant:

Appendix A

a. The year, make, type and registration number of the wrecker. The wrecker must be registered or leased for one year to the applicant, and the registration card of lease must be exhibited to the borough;

b. The name and address of the applicant, and if a corporation, the name and address of each officer and director thereof, and if a partnership, the name and address of each partner thereof;

c. The name and address of the owner of the wrecker, if other than the applicant;

d. The location or locations of the premises at which the wrecker is domiciled or garaged;

e. The location or locations of the premises to which vehicles are towed, a map or diagram accurately drawn depicting the proposed layout and size of the vehicle storage spaces, and fire lanes and the maximum number of vehicles to be stored at such premises;

f. Information as to whether the applicant has satisfactory and personal references indicating the ability to comply with the terms of this section;

g. A complete list of all criminal convictions, except minor traffic violations, of the applicant or owner, partner, officers or local office manager of applicant;

h. Whether the wrecker is to be used as an accessory use to a gasoline service station.

Appendix A

4-11.4 Insurance Requirements. Each application for a license shall be accompanied by certificates of automobile and garage keeper's liability insurance, issued by an insurance company authorized to do business in the State of New Jersey, with policy limits of not less than $300,000 per person and $500,000 per accident for bodily injury and not less than $25,000 for property damage. Each licensee shall, in addition to the foregoing insurance requirements, carry indemnification insurance in favor of the Borough of Fort Lee, in an amount not less than one hundred fifty thousand ($150,000.00) dollars.

4-11.5 Investigation of Application.

a. Upon receipt of a completed application as required by subsection 4-11.3 and certificates of insurance as required by subsection 4-11.4, the borough clerk shall forthwith submit copies of the application to the building department, the fire prevention bureau and the police department for investigation and reports. The building department and the fire prevention bureau shall report to the borough clerk as to whether the proposed domicile of the wrecker complies with local zoning, building and fire prevention ordinance. The police department shall investigate the applicant and report as to whether the applicant and his equipment are qualified to conduct a safe, honest and efficient wrecker service. All such reports shall be made in writing to the borough clerk within 20 days after requested.

b. Each applicant for a new license must provide and continue to provide during the licensing year secure storage for a minimum of 50 vehicles. Storage for 15 vehicles must be within one-quarter mile of the boundaries of Fort Lee. All automobiles towed pursuant to this section shall be stored at the aforesaid location for a minimum period of seven days, after the expiration of which said

vehicles may be removed at the option of licensee to another secure storage location, not to be located further than two miles from the border of the borough. Said storage area to be of sufficient size to store 35 vehicles. Trucks, buses, tractor trailers and other heavy equipment over a five ton gross weight are exempt from the requirement of initial seven day storage within the borough.

4-11.6 Registration. Each employee or agent of licensees under this section who operates a wrecker within the borough shall be registered with the borough clerk, and such registration shall be the joint obligation of the employee or agent and employer. The registration shall include at least the name and address of the employee or agent, the name of the employer, criminal convictions, if any, of the employee or agent, the length and type of the employee's or agent's experience in the wrecker business and with the employer, and such other information as may be prescribed by the chief of police. All registration forms shall be reviewed by the chief of police, or his designated representative, who shall determine, within ten days of its submission, whether a registration should be issued. A registration shall be denied only for just cause, in which event the employee or agent and employer shall be notified forthwith. Within ten days of such notification, the employee or agent or employer may appeal the decision to the mayor and council, which shall hear and decide the appeal within 45 days after the date it was filed with the borough clerk.

1. All licensees, except those licensees which are solely accessory uses to gasoline and service stations, whether on the police tow list or police road service list, or not on such lists, must provide secure storage space for fifteen (15) vehicles, which storage area shall be fenced if deemed necessary by the Construction Code Official.

Appendix A

2. Vehicle storage spaces and lots shall conform to all requirements of the Borough of Fort Lee Building and Fire codes where applicable and shall conform to the ordinances of the respective municipal jurisdiction of location.

3. If the storage area is not situated within the boundaries of Fort Lee, a current and valid Certificate of Occupancy or other proof of the legal use of the premises to store automobiles must be presented with the application.

4. If the storage area is not owned by the applicant, a copy of a written lease agreement for the storage area must accompany the application.

6. Only one (1) license shall be granted to an applicant. No applicant who obtains a license shall have any interest, direct or indirect, in any other licensee. In the event that it is determined that a licensee does have an interest (according to the same standards utilized for the issuance of alcoholic beverage licenses) in another towing license, that licensee shall immediately forfeit both licenses.

7. No license shall be granted to any applicant who does not fulfill each and every requirement of this section, and all other requirements of this Chapter. New licenses shall be issued effective January 1 of each year only. Attendance at an annual meeting each November to formulate the list shall be mandatory.

4-11.7 Approval or Denial by Borough Council: Hearing. Upon receipt of all reports as set forth in subsection 4-11.5 the borough clerk shall forthwith transmit same to the mayor and council, which shall grant or deny the issuance of a license

within 30 days after receipt of all reports. No application shall be denied unless the mayor and council determines that the applicant has not demonstrated the ability to comply with the terms of this section, for any reason specified in sub-section 4-11.11 hereof, or for other just cause. In the event of any denial, the applicant shall forthwith be notified thereof in writing, which shall specify the reason for the denial. After receipt of such notification, the applicant shall have ten days in which to make written request to the borough clerk for a hearing before the mayor and council.

4-11.8 Fees: Copies of License.

a. Each wrecker shall be licensed separately. The fee for each such license for a wrecker who is listed on the call list under subsection 4-11.19 shall be two hundred fifty ($250.00) dollars per year for the first wrecker, and fifty ($50.00) dollars per year for each additional wrecker owned by the same licensee and domiciled at the same address. The fee for each such license for a wrecker who is not listed on the call list under subsection 4-11.19 shall be one hundred ($100.00) dollars per year for the first wrecker, and fifty ($50.00) dollars per year for each additional wrecker owned by the same licensee and domiciled at the same address. Each such license shall be issued in duplicate. One copy of the license shall be kept at all times at the location at which the wrecker is domiciled. Each license shall be valid from the date of its issuance through December 31 of the year of its issuance. Licensees shall not be transferable.

b. Each employee or agent of licensees registered under this section shall pay an annual permit fee of ten ($10.00) dollars.

4-11.9 Renewal of License. Any license issued hereunder may be renewed for additional periods of one year upon:

Appendix A

a. Submission to the borough clerk of a renewal application containing the same information as required by subsection 4-11.3 hereof;

b. Presentation of renewed insurance certificates as required by subsection 4-11.4; and

c. Payment to the tax collector - treasurer of a renewal fee in the amount of two hundred fifty ($250.00) dollars or one hundred ($100.00) dollars, whichever is applicable in accordance with subsection 4-11.8a. The mayor and council has the right to deny, within 30 days after the submission of all items required by this section, the renewal of any license if it finds that the applicant no longer demonstrates the ability to comply with the terms of this section. For any reason specified in subsection 4-11.11 hereof or for other just cause. In the event any renewal of a license is denied, the applicant shall forthwith be notified in writing, which shall specify the reason for the denial. After receipt of such notification, the applicant shall have ten days in which to make written request to the borough clerk for a hearing before the mayor and council.

4-11.10 Transfer or Assignment of Licenses Not Permitted. Any license or registration required by this section shall not be transferred or assigned without the prior approval of the mayor and council, nor shall the domicile of any wrecker, licensed hereunder be changed without the prior approval of the mayor and council.

4-11.11 Penalties. In addition to any penalties which may be imposed for the violation of any provision of this section, the mayor and council may suspend or revoke any license granted hereunder, after written notice and public hearing, for any of the following reasons:

Appendix A

a. Fraud or willful and knowing misrepresentation or false statement made in an application for a license.

b. Fraud or willful and knowing misrepresentation or false statement made in the conduct of any wrecker service.

c. Failure to maintain insurance in the amounts set forth in subsection 4-11.4 hereof.

d. Violation of any other provision of this section.

e. Violation of any law or regulation of the State of New Jersey, specifically including, but not limited to, violations of motor vehicle laws and regulations.

f. Other just cause.

4-11.12 Driving to Solicit Business Prohibited. No person shall operate an unengaged wrecker along a public street in the borough at a slow rate of speed or in any other fashion calculated for the obvious purpose of soliciting business.

4-11.13 Owner's Consent Required to Remove Vehicle from Borough Exception. No person shall tow or remove, or cause to be towed or removed, any vehicle from a location within the Borough of Fort Lee to a location outside the borough except as provided herein: provided, however, that if a towed vehicle remains unclaimed at the premises of a wrecker for more than 20 days, then and in that event the vehicle may be removed by a wrecker without the owner's consent to a location outside the borough; provided further, however, that at least five days prior to any such removal, the owner is notified by certified mail, return receipt requested, of the intent to remove such vehicle to a location

outside of the borough and the address of such location.

4-11.14 Rates for Towing, Conveying, Repair, Service or Storage.

a. Service charges:

1. Road service between 8:00 a.m. and 6:00 p.m. weekdays - $10.00

2. Road service on nights, weekends and holidays - $15.00.

3. Gasoline delivery - road service charges plus current gasoline price.

4. Removing damaged tires and replacing same with spare - $20.00 plus road service charge.

5. Removing damaged tires, repairing and remounting same - $5.00 plus road service charge.

6. Labor charges between 8:00 a.m. and 6:00 p.m. weekdays - $12.00 per hour after first 15 minutes, plus road service charge.

7. Labor charges at all other times - $18.00 per hour after first 15 minutes plus road service charge.

Appendix A

b. Towing charges:

	Days 8:00 a.m. 6:00 p.m.	Nights, week-ends and holidays 6:00 p.m. 8:00 a.m.
1. Automobiles	$ 40.00	$ 50.00
2. Trucks one ton capacity or less	$ 40.00	$ 50.00
3. Trucks over one ton capacity but under five ton capacity	$ 60.00	$ 75.00
4. Trucks, buses tractor trailers and other heavy equipment over five ton capacity	$125.00	$125.00
5. Motorcycles or motor scooters	$ 35.00	$ 40.00
6. Police and other municipal vehicles		
(a) $20.00 if in Fort Lee		
(b) $30.00 outside of Fort Lee		

Appendix A

c. Dolly service or flatbed tows if required or requested:

1. Automobiles and trucks one ton capacity and under		$ 15.00
2. Automobiles and trucks over one ton capacity but under five ton capacity	$ 30.00	$ 30.00
3. Other heavy equipment over five ton capacity		$ 50.00

d. Winching service charges:

1. Light wreckers	$30.00 per hour/unit
2. Heavy wreckers	$60.00 per hour/unit
3. Snow locked vehicles	$10.00 per tow, additional charge

e. Storage charge (after first 24 hours)

1. Trucks one ton capacity or under	$10.00 per day
2. Trucks over one ton capacity but under five ton capacity	$15.00 per day

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3. Trucks, buses, tractor trailers and other heavy equipment over five ton capacity	$20.00 per day
4. Motorcycles or motor scooters (inside)	$10.00 per day
5. All automobiles - no charge for first 24 hours. Thereafter.	$10.00 per day

f. Any person found to be in violation of the terms and conditions of this section, two times within any one year, shall have his license to operate a wrecker or towing service in the Borough of Fort Lee suspended for six months.

g. It shall be the duty of all wreckers and towing services to maintain a listing of the rates shown herein in their vehicles and to have a sign permanently affixed to the vehicle reading "Fort Lee Schedule of Rates in Cab."

4-11.15 Written Schedule of Rates and Charges.

a. Every owner and operator of a wrecker shall maintain a written schedule of all rates and charges, in compliance with the limitations of subsection 4-11.14 hereof, and shall make such schedule available to any person requesting same at any time.

b. Every wrecker shall have conspicuously displayed thereon, either painted or permanently affixed, a schedule of the maximum towing charge permitted under subsection 4-11.14b1 and a statement that a full schedule of rates will be supplied on request.

c. Whenever practicable, the owner or driver of any vehicle utilizing wrecker services shall be given a copy of a full schedule of rates at the time the wrecker services are rendered. In any event, a full schedule of rates shall be annexed to each bill for wrecking services.

d. Before any license is issued or renewed as provided in this section, a representative of the police department shall inspect the wrecker to determine whether the schedule and statement prescribed by subsection b of this section are conspicuously displayed on the wrecker.

4-11.16 Outdoor Storage of Disabled Vehicle; Time Limited. No licensee shall cause or suffer any disabled vehicle to be stored outdoors upon premises owned or leased by the licensee for a period in excess of 20 days.

4-11.17 Collection of Parking or Other Fees Prohibited. No licensee under this section shall, in the course of providing service, collect parking fees or fees for services other than those rendered by the licensee.

4.11-18. Towing, Who May Request. No licensee shall tow a vehicle from private property except at the direction of the police department or at the express written request of the owner or lessee of the property or at the express written request of both owner or authorized operator of the vehicle and the owner or lessee of the property.

Only Fort Lee licensed companies shall be permitted to tow vehicles under the aforesaid conditions. Nothing in this section shall preclude any owner or authorized operator of a vehicle from individually contracting with any tow company, whether or not the tow company is licensed by the Borough of Fort Lee.

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4-11.19 Rules and Regulations:

a. The police department of the borough shall establish an annual call list for the performance of wrecking and towing services. A secondary list shall be prepared and maintained by the police chief to be used when the primary tow company does not call in by 8:00 a.m. on assigned date or does not respond to a call within 20 minutes. No towing company shall substitute any other tow company. This shall be the sole responsibility of the police department.

b. The chief of police shall promulgate and recommend rules and regulations for the retention and performance of wreckers and towers, which shall be filed in the office of the borough clerk. All licensees shall be required to contribute on a pro rata basis the cost of a pager system to be implemented for the purpose of enabling a shorter response time for requests for towing and wrecker service. In addition to the carrying of the aforesaid pager system, each wrecker used and operated pursuant to this section shall contain certain designated equipment: brooms, flares, chains, fire extinguishers, jumper cables, shovel, air tank, lug wrench, and such other equipment as deemed necessary at the sole discretion of the chief of police.

c. In addition to any other regulations, the towing company shall, upon request, release personal belongings to the vehicle owner or authorized designee.

4-11.20 Notification of Police if Towed Without Express Consent of Owner. Every licensee shall, upon removal or towing of any vehicle without the express consent of the owner or driver thereof, immediately notify the police department of the year, make, model and license number of the vehicle, the location from

which the vehicle is removed and the location to which the vehicle is removed. The police department shall record this information and assign a confirmation number which will be given to the licensee. The licensee will be required to use this confirmation number as proof of compliance with the terms of this section in case of any dispute. The absence of a confirmation number will be deemed as proof that the licensee failed to notify the police department when they have towed a vehicle without the express consent of the owner or driver.

4-11.21 Release of Vehicles. Tow companies shall not release a vehicle until the owner of the vehicle, or his designee, presents a receipt for the release. The receipt shall be obtained by the owner, or his designee, from the police department.

Tow companies shall be required to release the vehicle at any time during the first 24 hours after the tow has been recorded. After the first 24 hours, vehicles shall be released only between the hours of 8:00 a.m. and 8:00 p.m.

The terms and conditions of this section shall not apply to any wrecker which picks up a disabled vehicle outside the borough limits nor to any wrecker who is not domiciled in Fort Lee and whose services are requested by the owner or driver of a disabled vehicle only for the purpose of towing the vehicle outside the borough limits.

4-11.22 Abandoned Vehicles.

a. If after seven days following the towing away of an automobile by a tow company on behalf of the borough, no inquiry has been made by the owner, driver or an interested insurance company, then before the tenth day from the date of towing, the tow

company shall notify the police department of this fact upon the form prescribed by the police department.

b. The police department shall then notify the owner of said vehicle of the name of the tow company which is holding the vehicle. Said notification shall also advise the owner of the provisions of paragraph c of this subsection.

c. If after 30 days from the date of towing, the vehicle remains unclaimed, then it shall be deemed abandoned and the borough shall be entitled to take such action as is permitted under N.J.S.A. 39:10A (Abandoned Vehicle Law).

d. In the event any such vehicle is sold pursuant to N.J.S.A. 39:10A, the storage and other charges permitted to be charged by tow companies pursuant to this section, shall be in accordance with P.L. 1987, C127 and any amendments thereto.

4-11.23 Clean Up. Any tow company removing a vehicle from the scene of an accident in the Borough of Fort Lee shall be responsible for collecting and disposing of all loose glass, metal and other debris on the roadway in and about the scene of the accident, and said tow company shall further be responsible for sweeping the roadway before towing the vehicle from the scene.

4-11.24 Public Auctions. The borough shall charge the tow company the sum of fifty ($50.00) dollars whenever the borough is required to sell a vehicle. The fee offsets the borough's cost for advertising, notifications and titles.

4-11.25 Refusal of Police Tow. There is hereby established a twenty ($20.00) dollar service charge to be paid by the owner of any vehicle who refuses to have his vehicle towed by a tow truck called by the police.

APPENDIX A — BOROUGH OF FORT LEE ORDINANCE NO. 87-45

BOROUGH OF FORT LEE

BERGEN COUNTY, NEW JERSEY

ORDINANCE NO. 87-45

AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 4-11 OF THE REVISED GENERAL ORDINANCE OF THE BOROUGH OF FORT LEE ENTITLED "WRECKERS AND TOWING SERVICE"

BE IT ORDAINED by the Mayor and Council of the Borough of Fort Lee as follows:

SECTION I

The following section of Chapter 4-11 of the Revised General Ordinances of the Borough of Fort Lee be and are hereby amended and supplemented as follows:

A. By addition to Section 4-11.3(a) of the following:

"The wrecker must be registered or leased for one (1) year to the applicant, and the registration card or lease must be exhibited to the Borough."

B. By addition to Section 4-11.4 of the following:

"Each licensee shall, in addition to the foregoing insurance requirements, carry indemnification insurance in favor of the Borough of Fort Lee, in an amount not less than $150,000.00."

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C. By the amendment of Section 4-11.5(b), such that same will read as follows:

"b. Each application for a new license must provide for secure storage for a minimum of fifteen (15) vehicles within one-quarter (1/4) mile of the boundaries of the Borough of Fort Lee. All automobiles towed pursuant to this ordinance shall be stored at the aforesaid location for a minimum period of seven (7) days, after the expiration of which said vehicles may be removed at the option of licensee to another secure storage location, not to be located further than two (2) miles from the border of the Borough. Said storage area to be of sufficient size to store thirty-five (35) vehicles. Trucks, buses, tractor trailers and other heavy equipment over a five (5) ton gross weight are except from the requirement of initial seven (7) day storage within the Borough.

1. All licensees, except those licensees which are solely accessory uses to gasoline and service stations, whether on the police tow list or police road service list, or not on such lists, must provide secure storage space for fifteen (15) vehicles, which storage area shall be fenced if deemed necessary by the Construction Code Official.

2. Vehicle storage spaces and lots shall conform to all requirements of the Borough of Fort Lee Building and Fire codes where applicable and shall conform to the ordinances of the respective municipal jurisdiction of location.

3. If the storage area is not situated within the boundaries of Fort Lee, a current and valid Certificate of Occupancy or other proof of the legal use of the premises to store automobiles must be presented with the application.

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4. If the storage area is not owned by the applicant, a copy of a written lease agreement for the storage area must accompany the application.

6. Only one (1) license shall be granted to an applicant. No applicant who obtains a license shall have any interest, direct or indirect, in any other licensee. In the event that it is determined that a licensee does have an interest (according to the same standards utilized for the issuance of alcoholic beverage licenses) in another towing license, that licensee shall immediately forfeit both licenses.

7. No license shall be granted to any applicant who does not fulfill each and every requirement of this section, and all other requirements of this Chapter. New licenses shall be issued effective January 1 of each year only. Attendance at an annual meeting each November to formulate the list shall be mandatory.

D. By the amendment of the first sentence of Section 4-11.9(c) so as to read:

"c. Payment to the tax collector-treasurer of a renewal fee in the appropriate amount of two hundred and fifty dollars ($250.00) or one hundred dollars ($100.00), whichever is applicable in accordance with subsection 40-11.8a"

E. By the amendment of Section 4-11.14b. such that same shall provide:

"1. Automobiles: $40.00 (days); $50.00 (nights, weekends and holidays)

2. Trucks one ton capacity or less: $40.00 days; $50.00 (nights, weekends and holidays)

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3. Trucks over one ton capacity, but under five ton capacity: $60.00 (days); $75.00 (nights, weekends and holidays)

6. Police and other municipal vehicles: $20.00 (if in Fort Lee); $30.00 (outside of Fort Lee)"

F. By the amendment of Section 4-11.14c to read as follows:

"c. Dolly service or Flat Bed Tows if required or requested.

G. By the addition to Section 4-11.14d of the following:

"3. Snow locked vehicles: $10.00 per tow. "additional charge.

H. By the amendment of Section 4-11.14e such that same will read as follows:

"1. Trucks one (1) ton capacity or under: $10.00 per day.

2. Trucks over one (1) ton capacity but under five (5) ton capacity: $15.00 per day.

3. Trucks, buses, tractor trailers and other heavy equipment over five ton capacity: $20.00 per day.

4. Motorcycles or motor scooters (inside): $10.00 per day.

5. All automobiles: no charge for first 24 hours. Thereafter, $10.00 per day."

I. By the amendment of Section 4-11.14f, such that same shall read as follows:

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"Any person found to be in violation of the terms and conditions of this section, two times within any one year, shall have his license to operate a wrecker or towing service in the Borough of Fort Lee suspended for six (6) months."

J. By the addition to Section 4-11.18 of the following: "Only Fort Lee licensed companies shall be permitted to tow vehicles under the aforesaid conditions. Nothing in this section shall preclude any owner or authorized operator of a vehicle from individually contracting with any tow company, whether or not the tow company is licensed by the Borough of Fort Lee."

K. By the deletion of 4-11.19 in its entirety, and the replacement of same with the following:

"4-11.19 Rules and Regulations. a. The Police Department of the Borough shall establish an annual call list for the performance of wrecking and towing services. A secondary list shall be prepared and maintained by the Police Chief to be used when the primary tow company does not call in by 8:00 p.m. on assigned date or does not respond to a call within twenty (20) minutes. No towing company shall substitute any other tow company. This shall be the sole responsibility of the Police Department.

b. The Chief of Police shall promulgate and recommend rules and regulations for the retention and performance of wreckers and towers, which shall be filed in the Office of the Borough Clerk. All licensees shall be required to contribute on a pro rata basis the cost of a pager system to be implemented for the purpose of enabling a shorter response time for requests for towing and wrecker service. In addition to the carrying of the aforesaid pager system, each wrecker used and operated pursuant to this ordinance shall contain

certain designated equipment: brooms, flares, chains, fire extinguishers, jumper cables, shovel, air tank, lug wrench, and such other equipment as deemed necessary at the sole discretion of the Chief of Police.

c. In addition to any other regulations, the towing company shall, upon request, release personal belongings to the vehicle owner or authorized designee."

L. By the deletion of Section 4-11.20 in its entirety and replacement thereof with the following:

"4-11.20 Notification of Police if Towed Without Express Consent of Owner. Every licensee shall, upon removal or towing of any vehicle without the express consent of the owner or driver thereof; immediately notify the police department of the year, make, model and license number of the vehicle, the location from which the vehicle is removed and the location to which the vehicle is removed. The Police Department shall record this information and assign a confirmation number which will be given to the licensee. The licensee will be required to use this confirmation number as proof of compliance with the terms of this section in case of any dispute. The absence of a confirmation number will be deemed as proof that the licensee failed to notify the Police Department when they have towed a vehicle without the express consent of the owner or driver.

M. By the deletion of Section 4-11.21 in its entirety and replacement thereof with the following:

"4-11.21 Release of Vehicles. Tow companies shall not release a vehicle until the owner of the vehicle, or his designee, present a receipt for the release. The receipt shall be obtained by the owner, or his designee, from the Police Department.

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Tow companies shall be required to release the vehicle at any time during the first 24 hours after the tow has been recorded. After the first 24 hours, vehicles shall be released only between the hours of 8:00 a.m. and 8:00 p.m.

The terms and conditions of this section shall not apply to any wrecker which picks up a disabled vehicle outside the Borough limits nor to any wrecker who is not domiciled in Fort Lee and whose services are requested by the owner or driver of a disabled vehicle only for the purpose of towing the vehicle outside the Borough limits."

N. By the deletion of Section 4-11.24 in its entirety, and replacement of the following:

"4-11.24 Public Auctions. The Borough shall charge the tow company the sum of $50.00 whenever the Borough is required to sell a vehicle. The fee offsets the Borough's cost for advertising, notifications and titles.

O. By the amendment of Section 4-11.13, such that same will read as follows:

"No person shall tow or remove, or cause to be towed or removed, any vehicle from a location within the Borough of Fort Lee to a location outside the Borough except as provided for herein: . . . "

P. By the amendment of Section 4-11.22d, such that same will read as follows:

"In the event any such vehicle is sold pursuant to N.J.S.A. 39:10A, the storage and other charges permitted to be charged by

tow companies pursuant to this section, shall be in accordance with P.L. 1987, C127 and any amendments thereto.

SECTION II

All parts, portions, and sections of Chapter 4-11 not inconsistent with the provisions hereof are hereby ratified and reconfirmed, and all parts, portions and sections of Chapter 4-11 which are inconsistent herewith are hereby replaced.

SECTION III

Should any part, portion, or section of this Ordinance be held invalid or unconstitutional, said determination shall have no effect on any other part, portion or provision hereof.

SECTION IV

This Ordinance shall take effect immediately upon final passage according to law.

ATTEST:

APPENDIX A — BOROUGH OF FORT LEE ORDINANCE NO. 87-54

DATE OF INTRODUCTION: *11/2*

PUBLIC HEARING: *12/14*

DATE OF ADOPTION: *12/14/87*

BOROUGH OF FORT LEE — BERGEN COUNTY

ORDINANCE NO. *87-54*

AN ORDINANCE AMENDING AND SUPPLEMENTING ORDINANCE 87-45 TO SPECIFY THAT A TOTAL OF 50 STORAGE SPACES MUST BE PROVIDED BY EACH LICENSEE

ORDAINED by the Mayor and Council of the Borough of Fort Lee as follows:

Section I, Paragraph "C" is hereby amended as follows:

"b. Each applicant for a new license must provide secure storage for a minimum of 50 vehicles. Storage for 15 vehicles must be within one-quarter mile of the boundaries of Fort Lee. All automobiles towed pursuant to this ordinance shall be stored at the aforesaid location for a minimum period of seven (7) days, after the expiration of which said vehicles may be removed at the option of licensee to another secure storage location, not to be located, further than two (2) miles from the border of the Borough. Said storage area to be of sufficient size to store 35 vehicles. Trucks, buses, tractor trailers and other heavy equipment over a five (5) ton gross weight are exempt from the requirement of initial seven (7) day storage within the Borough.

Appendix A

SECTION II. All other parts of Ord. 87-45, not inconsistent herewith shall remain in full force and effect.

SECTION III. The ordinance shall take effect immediately upon passage and publication as required by law.

APPENDIX B — PETITIONER'S APPLICATION FOR TOWING LICENSE FOR 1988

BOROUGH OF FORT LEE

TOWING LICENSE APPLICATION

NAME: *Dermont Benecke*

ADDRESS: *90 Tracey Place*

CITY/STATE: *Englewood, N.J. 07631*

HOME PHONE: *568-4692*

TRADE NAME: *TCB Towing & Road Svc. Inc.*

BUS. ADDRESS: *404 E. Edsall Blvd., Palisades Pk.*

BUS. PHONE: *945-1135*

Anyone other than applicant have financial interest in this business? *No*

VEHICLE INFORMATION:

	Vehicle #1
Year:	*1983*
Make:	*GMC*
Model:	*Wrecker*
Lic. Place #:	*XF72WGNJ*

Appendix B

Identification #: *DHC34M2DV520097*

STORAGE LOCATIONS FOR TOWED VEHICLES:

	Storage Area #1	Storage Area #2
Address:	*404 E. Edsoll Blvd.*	*Same*
	Palisades Park, NJ 07650	*Same*
Maximum # of Vehicles:	50	

IMPORTANT - THE FOLLOWING MUST ACCOMPANY APPLICATION:

1. Proof of Vehicle Ownership
2. Proof of Property Ownership or Lease
3. Proof of Insurance

Do you wish to be included on Police Call List for Towing: *Yes*

Is this application for two connected to Gas Station only: *No*

*****

NOTE — POLICE DEPARTMENT MUST INSPECT VEHICLES AND APPROVE THIS APPLICATION BEFORE ACCEPTANCE

Appendix B

INSPECTED BY: (illegible)

INSPECTED BY: (illegible)

s/ illegible
Applicant's Signature

APPENDIX C — LETTER OF FEBRUARY 3, 1988, INFORMING PETITIONER OF DEFICIENCY IN APPLICATION

BOROUGH OF FORT LEE
THE MUNICIPAL COURT
MUNICIPAL BUILDING
309 MAIN STREET
FORT LEE, N.J. 07024

592-3575

February 3, 1988

TCB Towing
P. O. Box 182
Fort Lee, New Jersey 07024

Dear Mr. Benecke:

On January 20, 1988 you filed an incomplete application for a towing license and stated you would return later that day with the documentation required. You did not return and I did not receive further documentation. Today, I received a certificate of auto liability coverage for TCB Towing.

Your application *cannot* be processed until a *complete* application is filed.

If you do not wish to have your application considered, please sign the enclosed voucher for a refund of fees paid.

Sincerely yours,

s/ Carol Kohout
Carol Kohout
Borough Clerk

Appendix C

CK: jda
Encl.
cc: Deputy Chief Sal Careri

APPENDIX D — MEMORANDA OF HONORABLE JOHN R. DeSHEPLO DATED FEBRUARY 21, 1989

Borough of Fort Lee

THE MUNICIPAL COURT
MUNICIPAL BUILDING
309 MAIN STREET
FORT LEE, N.J. 07024

592-3575

MEMO

TO: CHIEF ARTHUR SIEBERT, FORT LEE POLICE DEPARTMENT

FROM: JOHN R. DESHEPLO, J.M.C.

DATE: 2/21/89

As of this date, all Borough Ordinance, Petty Disorderly Persons, Disorderly Persons and Indictable Offenses are to be handled as they have been in the past with regard to the issuance of the summons and the administering of the oath. Pursuant to N.J.S.A. 2A:8-27, a police officer can administer the oath on any of the above complaints.

s/ John R. DeSheplo
JMC

APPENDIX E — AFFIDAVIT OF DETECTIVE SERGEANT JOSEPH ZEVITZ, JR.

MORGAN, MELHUISH, MONAGHAN,
ARVIDSON, ABRUTYN & LISOWSKI
651 West Mt. Pleasant Avenue
Livingston, NJ 07039
(201) 994-2500
Attorneys for Defendants, Borough of Fort Lee, Zevitz, Careri and Kohout
File No. 08-456 U JK

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. L-39450-89

Civil Action

AFFIDAVIT OF DETECTIVE JOSEPH ZEVITZ JR.

GERALD BENECKE, individually and t/a TCB TOWING,

Plaintiff,

v.

BOROUGH OF FORT LEE, et al.,

Defendants.

STATE OF NEW JERSEY:
: ss
COUNTY OF BERGEN :

DETECTIVE JOSEPH ZEVITZ JR., being duly sworn, upon his oath, deposes and says:

1. I am a Detective of the Borough of Fort Lee Police

Appendix E

Department and as such, I am familiar with the facts stated herein.

2. I am submitting this Affidavit in support of the defendants' motion for summary judgment in the above-captioned matter.

3. In the instant matter, on February 7, 1989, the Honorable Judge Baron in the Bogota Municipal Court threw out 35 Summonses which had been issued by the Borough of Fort Lee. The Judge's reasoning differed on several of the Summonses. However, there appeared to be a problem with having the oath being administered by a police officer.

4. After Bogota Court decision, the matter was reviewed by the Fort Lee attorney, Kenneth Herbert. At that time, Mr. Herbert advised that the remaining Summonses should be issued which was done consistent with the Bogota Court's ruling in that the Deputy Court Clerk administered the oath. These additional Summonses were issued only after advice of counsel was sought.

5. Further, on February 21, 1989, a memorandum was handed down to the Fort Lee Police Department from Judge Desheplo in which he informed the Police Department that an officer could administer the oath for violations of Borough ordinances.

s/ Joseph Zevitz Jr.
DETECTIVE JOSEPH ZEVITZ JR.

Sworn and subscribed before me
this 26th of May, 1991

s/ ROCCO V. O'ATTOLICO
Notary Public

APPENDIX F — LETTER DATED OCTOBER 31, 1988 FROM KENNETH HERBERT, BOROUGH OF FORT LEE ATTORNEY

KENNETH W. HERBERT
ATTORNEY AT LAW
111 GRAND AVENUE
PALISADES PARK, NJ 07650
(201) 944-9898

October 31, 1988

Chief Arthur Siebert
Fort Lee Police Department
1325 Inwood Terrace
Fort Lee, New Jersey 07024

Dear Chief Siebert:

It has come to my attention that TCB Towing has applied for a towing license for the year 1989.

I have also been made aware that there are approximately 516 outstanding summonses that have been issued to TCB since January, 1988 for towing vehicles in Fort Lee without a license as required by Ordinance. I am told that these summonses will not be heard by the Municipal Court until TCB's claim of unconstitutionality can be resolved in the Superior Court. In the meantime, he continues to tow vehicles in Fort Lee without a license.

To me, this is an outrage. As an attorney, an officer of the Court, I am embarrassed with the Court's inaction. Although we can't do anything about that other than to proceed through normal judicial channels, I advise you not to issue a license to TCB.

Appendix F

Any person or company who flaunts the law of Fort Lee and has numerous unanswered outstanding summonses is not entitled to consideration, in my opinion. I, therefore, advise you that until such time as all these outstanding summonses are resolved, and any fines paid in full, TCB is not to be considered for a license.

Very truly yours,

s/ Kenneth W. Herbert
KENNETH W. HERBERT

KWH:ab
cc: Mayor and Council

APPENDIX G — TRANSCRIPT OF PROCEEDINGS OF SUMMARY JUDGMENT MOTION OF MAY 3, 1991

LAW DIVISION – CIVIL PART
BERGEN COUNTY
Docket No. L-39450-89

GERALD BENECKE, Individually and t/a TCB TOWING,

Plaintiff,

vs.

BORO OF FORT LEE, SALVATORE CARERI, JOSEPH ZEVITZ, CAROL KOHOUT, AND JOHN DOES (1-50)

Defendant.

TRANSCRIPT OF
RECORDED PROCEEDINGS
MOTION

Place: County Courthouse
Hackensack, NJ

Date: May 3, 1991

BEFORE:
HONORABLE MARGUERITE T. SIMON, J.S.C.

TRANSCRIPT ORDERED BY:
WILLIAM J. POLLINGER, ESQ.

Appendix G

APPEARANCES:
WILLIAM J. POLLINGER, ESQ.
Attorney for the Plaintiff

TIMOTHY SAIA, ESQ.
Attorney for the Defendants

Proceedings recorded by electronic sound recording, transcript 23 produced by transcription service.
Transcriber: Sandra Carbonaro

[2] THE COURT: Counsel, your appearances please.

MR. POLLINGER: William J. Pollinger, appearing on behalf of the plaintiff.

MR. SAIA: Timothy Saia, Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, for defendants, Boro of Fort Lee, Carol Kohout, Police Officer Zevitz, and Deputy Chief Careri.

THE COURT: Okay. You're looking for summary judgment, and you'll have detail. This is a rather intricate motion. In order to address each aspect properly, it's going to take some time. And that's one of the problems. It was already held until 10:30. Do you have any problems coming back this afteroon?

MR. SAIA: I have no problem, Judge.

THE COURT: Do you, Mr. Pollinger?

MR. POLLINGER: Judge, the case may seem complicated, or the motion may seem complicated. However, if I could just make a couple of statements and —

Appendix G

THE COURT: You can't. And let me tell you very frankly why I'm being careful. Because from the papers presented, I'm prone to grant it. And if I do look along those lines, it's very important that I address it very carefully, give you the opportunity to respond to each allegation.

MR. POLLINGER: That's why I wanted to make [3] the comment that I was going to make.

THE COURT: Okay.

MR. POLLINGER: The comment that I was going to make was, the facts that are presented by the defendants have nothing to do with the complaint.

THE COURT: Well, I have the complaint here, Counsel.

MR. POLLINGER: And I wholeheartedly agree with all of the facts that are set forth in the moving papers. But that's not what my cause of action is.

THE COURT: Well, Counsel, but we also know that the sumary judgment rule, that you can't rest upon the mere allegations in your complaint. You must submit to that.

MR. POLLINGER: I can unless the facts that are presented have nothing to do with the case. The fact — the defendant facts have nothing whatsoever to do with my case. And that's the problem with the motion.

THE COURT: but I haven't been presented other facts though, Counsel.

MR. POLLINGER: The facts are in the complaint. They can raise any facts they want, and I'll agree with them. But that's not what my allegations are.

[4] THE COURT Let's take the complaint. In fact my law clerk — to make sure I've got the court file on this one, and the complaint. Okay. "Plaintiff Gerald Benecke is a citizen, the sole proprietor of TCB Towing, operates his business in Palisades Park and customers within Fort Lee. Business is towing and storage. Tows vehicles from private property. Capable of being operated under their own power. Prior to '89 had been towing for private customers within Fort Lee for many years. Five, defendants have been involved in the consipiracy to destroy plaintiff's business." Now, isn't that —okay — "violate constitutional rights, preclude plaintiff from doing business with customers, and otherwise harm plaintiff." What are the facts giving rise to that? Isn't that — it looks like the same things in the complaint, that they hadn't gotten their towing license —

MR. POLLINGER: No, not at all. No, if your Honor please. The complaint in a nutshell is as follows. The City, through its Deputy Chief, filed unconstitutional summonses against the defendant, which were found to be unconstitutional, filed illegal summonses against the defendant, which were found to have been —

THE COURT: Who found them to be [5] unconstitutional?

MR. POLLINGER: Municipal Court Judges.

THE COURT: Judge —

MR. POLLINGER: Two Municipal Court Judges, with

appeals, both of which appeals were dismissed. And everything below was totally affirmed.

The statement by the defendant is, the only reason why the defendant denied —

THE COURT: Well, you're saying you've got abuse of process or —

MR. POLLINGER: Violation of —

THE COURT: No, no, I mean let's find the cause of action.

MR. POLLINGER: Absolutely. Violation of equal protection under the laws —

THE COURT: Wait, wait, wait —

MR. SAIA: We can simplify this, Judge.

THE COURT: Using the Courts and losing doesn't give equal protection. You claim —

MR. POLLINGER: There was a finding of unconstitutionality in the Lower Court already, and affirmed by the Superior Court Law Division. Finding of unconstitutionality. Thirty-five summonses were filed against the defendant, and they were found to have been unconstitutional.

[6] THE COURT: You've got — I don't have that in front of me. Where's the decision?

MR. POLLINGER: I don't have the decision.

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THE COURT: Well, that's not before me today, Counsel. You know the Rules of Court.

MR. POLLINGER: I understand. But that's what the complaint is. The complaint —

THE COURT: But there's nothing here to tell me that.

MR. POLLINGER: If your Honor please, what defendants are suggesting is, that if I file a complaint that says that the defendant fell because of improper maintenance of a wall, and they come in and say we built it properly, therefore we should get summary judgment, and I say fine, you did build it properly, but that's not my issue.

THE COURT: Counsel, all I'm saying to you, Mr. Pollinger, you're pleading the tort. Okay? You have to tell me —

MR. POLLINGER: No, I'm not pleading in tort. I'm pleading in violation of constitutional rights and conspiracy —

THE COURT: Wasn't that 1983 then?

MR. POLLINGER: Yes, but that's not a tort.

THE COURT: Well, that's what he's talking —

[7] MR. POLLINGER: That's not a tort.

THE COURT: That' what —

MR. SAIA: Judge —

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THE COURT: Counsel, that's what we're addressing, and that's what defendants are addressing in the brief.

MR. POLLINGER: But they're suggesting that my violation allegation, that the ordinance is unconstitutional. I don't know that's that. It's a wonderful ordinance. It's a fine ordinance. It's terrific. I have no problem with the ordinance. That's not the issue in the case. The issue is that they filed 259 summonses against my client which were illegal, and violated his constitutional rights.

THE COURT: You haven't presented anything to show me that.

MR. POLLINGER: Because they're raising facts that have nothing to do with the case.

THE COURT: Counsel, Counsel, Counsel, I can't hear what's not before me.

MR. POLLINGER: But if your Honor please, they're presenting things which aren't before you either. They're creating straw men, knocking them down, and saying that that's what my case is about.

THE COURT: Why didn't you present opposition [8] papers, Counsel?

MR. POLLINGER: I did.

THE COURT: But it's not in them.

MR. POLLINGER: I presented it — a 15-page brief which laid out all my arguments against the motion.

THE COURT: It just repeats the complaint, Counsel.

MR. POLLINGER: But that's all — if your Honor please, if I say that someone went through a red light and they say that they didn't go through a stop sign, I'm going to admit it. But the stop sign has nothing to do with going through a red light. My allegation is that they went through a red light. And they're saying that they didn't go through a stop sign. I say in my brief that the whole problem with their entire argument is that they're submitting facts, which I do not dispute, which have nothing to do with my case. So why dispute them? They can have all the motions granted they want on those facts. That's not my case.

MR. SAIA: Judge, based upon the opposition papers which were received, I believe that the plaintiff is stipulating to the fact that the Fort Lee ordinance was constitutional and that it was a proper exercise of the Fort Lee Police powers.

[9] MR. POLLINGER: I don't dispute that. I don't allege that it wasn't.

THE COURT: Wait, wait, Mr. Pollinger, let him finish.

MR. SAIA: Further, it appears that they are stipulating that the only claim which they are bringing is under Section 42 U.S.C. 1983. Is that correct, Mr. Pollinger?

MR. POLLINGER: And conspiracy to violate those rights; that's correct.

MR. SAIA: Which was filed under the 19—

THE COURT: Okay, so that's easier to —

MR. POLLINGER: Absolutely.

MR. SAIA: So the only issue which we have is whether the plaintiff in their complaint has established a Section 1943 cause of action. Plain and simple, Judge, there is no evidence in this case to suggest it.

The ordinance which was passed, which is admittedly constitutional, provided that the plainiff had to go through certain procedures in order to get a towing ordinance. There is no question that in 1987 the application which he submitted was incomplete. He was told it was incomplete. He was given an opportunity to provide the complete documentation; and yet, he failed to do so. During that one-year period, he violated the [10] statute numerous times. According to the plaintiff, over 250 times he was given summonses for violation of the statute.

Now, it is my understanding based upon the record —

THE COURT: Is he saying — I've got the case, I can't pronounce, City of St. Louis against Proprodnick (phonetic), 1983, that's Supreme Court 1987 case — well, no wait, Supreme Court 915 and that defines the cause of action. And are you saying there's an unconstitutional municipal policy, Mr. Pollinger?

MR. POLLINGER: I am not saying that there's an unconstitutional municipal policy. What I am suggesting to the Court is, that under the cases starting with Monell (phonetic), that Deputy Chief Careri and the Police Department entered upon a conspiracy to violate my client's rights by filing against him 259 summonses. Defendants take the position — let me first start out by suggesting to the Court, the defendants' entire argument is that we were very bad people because we violated 259 summonses.

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THE COURT: Mr. Pollinger, if I give you an adjournment for two weeks, can you present to me the record that these summonses have been found unconstitutional?

[11] MR. POLLINGER: Absolutely. Absolutely.

MR. SAIA: Judge, the statute, as far as my record of Fort Lee go, was the word "wrecker" was deemed to be vague. As you can see, attached to Exhibit A of my brief is the ordinance itself which defines wrecker as "any motor vehicle employed for the purposes of towing, transporting or conveying or removing any other motor vehicle which is inable to operate under its own power".

Mr. Benecke apparently had a quote unquote "tow truck" which the Municipal Court Judge had some difficulty finding (sic) within that meaning. I'm not going to contest the Municipal Court's decision.

However, regardless of such, Judge, the time frame which we're speaking of is very important. Mr. Benecke submitted his application on November 23rd of 1987. He was informed that it was —

MR. POLLINGER: That's the wrong year, Judge.

THE COURT: Okay, wait, Counsel, what I'm going to do, I'll tell you what I'm going to do. Because summary judgment is a drastic remedy. And were I to grant it I would preclude all of plaintiff's rights and ability to appear before this Court. I may ultimately grant it, I may ultimately not. I could be harsh and say to Mr. Pollinger well, you don't have the [12] facts. There was some question as to whether your facts were presented by way of affidavit and just attached to the brief. And then I got an affidavit late. So I've to to be fair to both sides.

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MR. SAIA: Well, Judge —

THE COURT: No, Counsel, let me finish. So I want to establish a time frame for you, Mr. Pollinger, to present to me the facts upon which you rely. And again, let's refer to the rule. You can't rest upon the mere allegations in the complaint, but must show facts give rise to the cause of the action.

Present that to me by next Friday.

MR. POLLINGER: That would be May 10.

THE COURT: May 10th.

MR. POLLINGER: If your Honor please, I will have the —

THE COURT: And then you have —

MR. SAIA: I'll stipulate that the tickets were thrown out.

THE COURT: With the grounds which they were thrown out.

MR. POLLINGER: I will have the Orders of the Court with respect to the constitutionality and the Appeal Orders from Judge Lucchi, and I will have all of the documentation to your Honor. There were Bogota [13] Municipal Court decisions, and Palisades Park Municipal Court decisions, and I will have all of those documents before the Court.

THE COURT: And you will have the opportunity to respond by the following Wedesday.

MR. SAIA: I understand that, Judge. The only problem which I have is these decisions were not issued until after the denial of the

applications. And therefore, these were statutes, ordinances which were on books, which of course —

THE COURT: Okay, I'll give you the right to rebut it. I just want to give Counsel the opportunity to present the papers.

We'll continue this motion in two weeks.

(Matter adjourned)

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STATE OF NEW JERSEY)
) SS
COUNTY OF MIDDLESEX)

I, Sandra Carbonaro, assigned transciber, do affirm that the foregoing is a true and accurate transcript, to the best of my ability, of the proceedings in the matter of Benecke v. Fort Lee, heard on May 3, 1991 in the Bergen County Superior Court, and recorded on Tape #54, Index #2160 to Index #3025 of that Court.

signed by

Sandra Carbonaro AOC #259

August 19, 1991
New Jersey Transcription Service

APPENDIX G — TRANSCRIPT OF PROCEEDINGS OF SUMMARY JUDGMENT MOTION OF MAY 31, 1991

LAW DIVISION – CIVIL PART
BERGEN COUNTY
Docket No. L-39450-89

GERALD BENECKE, Individually and t/a TCB TOWING,

Plaintiff,

vs.

BORO OF FORT LEE, SALVATORE CARERI, JOSEPH ZEVITZ, CAROL KOHOUT, AND JOHN DOES (1-50)

Defendant.

TRANSCRIPT OF
RECORDED PROCEEDINGS
MOTION

Place: County Courthouse
Hackensack, NJ

Date: May 31, 1991

BEFORE:
HONORABLE MARGUERITE T. SIMON, J.S.C.

TRANSCRIPT ORDERED BY:
WILLIAM J. POLLINGER, ESQ.

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APPEARANCES:

WILLIAM J. POLLINGER, ESQ.
Attorney for the Plaintiff

TIMOTHY SAIA, ESQ.
Attorney for the Defendants

Proceedings recorded by electronic sound recording, transcript 23 produced by transcription service.

Transcriber: Sandra Carbonaro

[1] THE COURT: This is a difficult case, and we adjourned it twice, and it's difficult because I was prone to grant summary judgment, and in many ways because it's 1983 and the conspiracy causes of action are difficult causes of action. I gave Mr. Pollinger the opportunity to submit some more papers in opposition.

Counsel, I started talking. I don't think you gave your appearances.

MR. POLLINGER: William J. Pollinger, appearing on behalf of the plaintiff.

MR. SAIA: Timothy Saia, Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, on behalf of the Boro of Fort Lee, Deputy Chief Careri, Officer Zevitz, and now Boro Administrator Carol Kohout.

THE COURT: Mr. Pollinger, I've been given the summonses and the Municipai Court papers, and most of them were thrown out because they were procedurally defective. And how do they give rise to a conspiracy or a 1983 case? How do they show the public policy?

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MR. POLLINGER: On reflection when I was preparing to argue the motion after I had submitted all the documents and re-reviewed everything that was in my file, it dawned on me that perhaps I should have made a cross motion for summary judgment. And the reason for [2] that is because the question of the constitutional violation is not an issue. And the reason why it is not an issue is because it has already been determined. Judge Baron in the Bogota Municipal Court specifically found on the basis of Ross and Solzman (phonetic) that the 35 summonses were not procedurally defective, they were constitutionally defective, because there was a violation of due process.

THE COURT: But does that, every time does, that that happens, does that give rise to a cause of action, Counsel?

MR. POLLINGER: Of course. That's the basis of the cause of action. The basis of the cause of action is the constitutional violation that has already been determined. The question that the defendants are bringing up as to this quote qualified immunity is not the qualified immunity that might apply to the procedural due process, but it's the qualified immunity that might apply on the basis of whether or not they had reasonable grounds to determine whether there was a basis for filing the complaint. I'm not suggesting that they didn't believe that Mr. Benecke may have violated the ordinance. The question of his violation or not violation is not the reason why it's a 1983 violation. The 1983 violation arises as a result of the procedural [3] due process deficiency, which has already been found. We are not dealing with an issue that is something which was raised in the case of Benecke vs. Boro of Fort Lee, which is before this Court. The question of the —

THE COURT: The procedural due process is per se an unconstitutional municipal policy?

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MR. POLLINGER: Absolutely. When it is found to have existed, that is in fact a specific basis for a 1983 action.

I can refer your Honor to Schwartz and Kirkland (phonetic) on Section 1983, Claims, Defenses and Counsel fees. It has now just come out in a new two-volume issue which I probably will be getting in my office fairly soon. But that's — that case was cited in Gregg vs. Township (phonetic) by Judge Long in the case that dealt with the issuance of counsel fees. That is the, as I understand it, the treatise that is presently being used by most Courts to determine whether or not there is a basis for a constitutional cause of action. And one of the specific cases wherein a constitutional 1983 action is specifically based, and there are sections that deal with that, is when there has been found to have been a procedural due process violation. It's not the question of whether the violation occurs [4] which gives rise to the 1983. It's a question of whether it has been found to have already occurred. In this case it has been found to have already occurred. The case which I am dealing with now is a Superior Court case. This Superior Court case being a Municipal Appeal, Docket No. 89-0058, which was before Judge Lucchi. Judge Lucchi dismissed that case, finding that the contentions which could form the basis for a reversal of such dismissals, had no merits. That's a substaniative affirmance of the Municipal Court determination that there were in fact constitutional violations.

THE COURT: Are you saying that every time I sit here and affirm, you know, or throw out a Municipal Court case, or affirm a rejection of one, that gives rise to a civil lawsuit?

MR. POLLINGER: No, I'm not saying that at all. I'm not saying that at all. What I am saying is that the issue of the constitutionality, the violation of procedural due process, which was the basis for the determination by the Municipal Court, is now

a Superior Court decision. It is just as if the question of the violation of plaintiff's constitutional rights was before your Honor right this moment and you decided as a matter of law that there was procedural due process [5] constitutional deprivation. That decision that your Honor would make is exactly the same decision that Judge Lucchi made when he affirmed the Municipal Court.

When the Municipal Court's decision which was laid out on the record as to each and every summons and complaint was affirmed —

THE COURT: Judge DeMiglio you're talking about?

MR. POLLINGER: No, Judge Baron. Each and every complaint was specifically dealt with. When that was affirmed by Judge Lucchi, and was not appealed, that became a final judgment, and is now res judicata with respect to that issue. And what is that issue? The issue is the constitutionality of the conduct of the defendants. The procedural due process — you don't have to bang the table, Mr. Saia, you'll have your opportunity.

The procedural due process, which was determined by Judge Baron to have existed, that is in and of itself a constitutional violation. If I were to come before a Court and suggest to the Court that anyone, no matter who it was, deprived my client of procedural due process, and that was found as a matter of law, that would give rise at least for a basis for nominal damages. Without anything further. It's just as if you [6] were stopped from going into a voting booth. If a Judge found that that constituted a due process or equal protection violation, whether it is procedural or substaniative or anything else, the violation itself is the determining factor as to whether or not there is a cause of action.

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We are beyond the question of whether the conduct of the individual defendants gives rise to a cause of action. That question is not one which I suggest the Court can decide on summary judgment, in the first instance. But in the second instance, it's already been decided.

When I was here a couple of weeks ago, three or four weeks ago, however long it was, I suggested to your Honor that the facts which were being raised by the defendant, even if I agreed with them, might be interesting to agree with but it would have nothing to do with my case. because it was akin to my alleging that the defendant went through a stop sign, and if they come into Court and say well, we didn't go through a red light, and I agree with that, they're suggesting well, since there's no question of fact and I agree with that, they're entitled to summary judgment. That's not the way it works.

My case in a nutshell is as follows. There [7] are individual claims against the individual defendants for interference with Mr. Benecke's business —

THE COURT: Do they have qualified immunity under Hayes (phonetic)?

MR. POLLINGER: No, they do not have quailfied immunity for common law conduct, for which the Tort Claims Act has no relevance when I'm dealing with individuals. I don't have any notice problems, I don't have any kind of conduct problems with that. They're — in my first count or the complaint, there are actions against the individual defendants, where I allege that they have in and of themselves been guilty of conduct which gave rise to lawsuits to the plaintiff.

My understanding is that we're not dealing with that. We're dealing with the constitutional questions here. The constitutional —

THE COURT: Well, I think there's both. I think there's both in the case. I think I have to address both. Conspiracy in 1983 is really what you're pleading.

MR. POLLINGER: Well, yes, but there's common law conspiracy also.

THE COURT: Right.

MR. POLLINGER: Because the 224 summonses which were issued after in 1989 for 1988 violations, one [8] of the bases of that claim is not that that's a constitutional problem, but that is evidence of the conspiracy which continually existed amongst the defendants, the individual defendants. The constitutional deprivation—

THE COURT: Conspiracy to do what though? Conspiracy, you have to have —

MR. POLLINGER: To take away his business.

The man — the individual —

THE COURT: So to take away — so he's got a property right is what you're saying.

MR. POLLINGER: No. No, no.

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THE COURT: Well, now what are you taking away then? He's got to have some right that you're trying to take away or privilege.

MR. POLLINGER: Let me phrase it this way. The individual defendants filed summonses and complaints — strike the word summonses — complaints against the plaintiff. Those complaints alleged certain conduct.

Those complaints were ultimately dismissed as the result of them being constitutionally defective and giving rise to violations of plaintiff's due process rights under Solzman and Ross (phonetic). Not that the individuals didn't believe honestly or not, that's a question of fact is what their intent was, that Mr. Benecke may have violated an ordinance, but there was procedural due [9] process violations involved. And I'll get to another example of procedural due process that gives rise to a 1983 cause of action, if your Honor will.

As the result of the conduct of the individual defendants, the municipality in December of 1988, specifically decided not to grant a 1989 license to the plaintiff. There was no basis enunciated in either the resolution or the records, the minutes of the meeting, other than the statements that were made to the Council and —

THE COURT: Shouldn't that then have been the subject of a prerogative writ?

MR. POLLINGER: It was.

THE COURT: And what happened?

MR. POLLINGER: By the time it came up for trial, because I

couldn't get an early trial date, Judge Murphy gave me a 1989 trial date which was after 1989 had already expired, and the case was dismissed as moot. There was nothing to try. The case was over.

THE COURT: That Order is in the papers before me?

MR. POLLINIGER: Yes, it is. That's correct.

As the result of the conduct of the individuals in filing complaints, which alleged in one complaint 414 violations, in another complaint 102 [10] violations, and then 33 other individual violations, on the basis of that the Council acted.

I am not suggesting and I don't stand here and I don't want anybody to believe that I am suggesting that the municipality didn't have a right to deny the license if there was a basis for it. What I am suggesting to the Court is that the denial was the result of the unconstitutional conduct of the individuals. And the municipality is liable as the employer of the individuals. Not because they denied his license, but because they were the, under respondeat sup —

THE COURT: Don't they have some kind of immunity, that they're acting in their official capacity?

MR. POLLINGER: I'm not claiming that there's anything wrong with their denial. I'm claiming that they're liable under the theory of respondeat superior for the unconstitutional conduct of the individuals.

The whole problem with the way the motion was pre —

THE COURT: Then you get tort claims involved, don't you?

MR. POLLINGER: Not at all.

MR. SAIA: Judge —

MR. POLLINGER: Excuse me, Mr. Saia, please.

[11] THE COURT: Okay .

MR. POLLINGER: If your Honor please.

THE COURT: You're talking 1983 .

MR . POLLINGER: Yes .

THE COURT: Okay.

MR. POLLINGER: The —

THE COURT: But I don't understand in addition to 1983 —

MR. POLLINGER: The whole problem with the way the defendant presented the argument was they started with the municipal conduct. I am not alleging that the municipality qua (phonetic) municipality did anything wrong. They had a right to deny his license if there was a basis for it.

What I am suggesting is that the reason why they denied it was a lie. It was false. It was unconstitutional, and it was a setup by the individuals. The individuals were involved in unconstitutional conduct, found by a Superior Court Judge to exist, which resulted in a denial. It is a result of the denial which is the damages. The cause of action is the 35 summonses. I'm not suggesting that the municipality's conduct in denying the license is an independent

cause of action. That's the result. That's the damages. His failure to obtain the license because of the illegal [12] unconstitutional conduct of the individuals is the damages aspect of the case. The cause of action is the 35 summonses in the first instance. Judge Baron specifically found that there was — let me go back and — I didn't cite this case because very frankly I really did not expect that the question was going to be asked of me in the manner in which it was.

I tried a case before Judge Harding in Middlesex County. The facts were simply as follows. A towing company was on a list of rotating towers who would be on and off either on a weekly basis, or whatever the basis was, it didn't really matter. As the result of a decision by the police chief, he removed my client from the towing list without notice, without a hearing. A suit was filed. The claim in the case was that there was procedural due process violation, which gave, which resulted in his losing business because he then had to comply with different kinds of things, an ordinance was introduced, and there was resultant damage. There was a motion which was made to dismiss the case, as there is a motion in this case. And the question arose as to whether or not procedural due process violation constituted a cause of action under 1983. There was only one case in the entire country, there may be some now that are reported, but there was [13] only one case in the entire country, which was a Federal District Court case out of Texas called Cowan, C-o-w-a-n vs. Corley, C-o-r-l-e-y. That case said that the failure to give notice for removal from a rotation list constitutes a basis for a procedural due process violation. And that that is the basis for a claim under Section 1983. It also happens to have said that once you are on the towing list, you have a property right. I am not suggesting that there's a property license to the license. It's a completely different line of cases.

THE COURT: So that doesn't make that case distinguishable from this one.

MR. POLLINGER: No, because they're separate issues. The property right issue was separate from the constitutional deprivation issue, and —

THE COURT: But constitutional deprivation of a property right, if you don't have the right what are you deprived of? Just due process.

MR. POLLINGER: That is enough under 1983. Absolutely enough under 1983. That is what gives rise to the violation.

As a matter of fact, let me go on with my story if I may. The case was tried. Judge Harding found as a matter of fact that there was failure to give I proper notice. He found that however, had there been a [14] hearing, and had the defendant complied with due process the person probably would have been removed anyway. And therefore he found that there was no basis for damages beyond nominal damages. I got an award of one dollar. He also refused to give me counsel fees. I said wait a minute, here's a procedural due process violation that you have found. You awarded me damages, I'm now entitled to counsel fees. I went up to the Appellate Division.

THE COURT: They gave you counsel fees.

MR. POLLINGER: Not only did they give me counsel fees, I got $16,000 in counsel fees for a one dollar judgment because there was a procedural due process violation. The procedural due process violation is in and of itself a basis for an award of damages.

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Let me suggest to your Honor the following. If you are precluded from going into a voting booth because you are not allowed to put your name down on the list and it turns out that you're not a citizen of that state, your rights, your procedural rights and perhaps your substantiative rights may have been violated —

THE COURT: Let me ask you something, Mr. Pollinger. Aren't there within the scope of procedural due process rights, some difference? For example, you could say Miranda Rights. Are they procedural or [15] substanative?

MR. POLLINGER: I don't know the answer. I do not do any criminal law and I don't know the answer. I think they're substanative.

THE COURT: There are pro — I guess what I'm saying is there are procedures and there are procedures

MR. POLLINGER: I agree. And there are procedures —

THE COURT: And I'm the wrong person signing a summons.

MR. POLLINGER: There are procedures and there are pro — I agree with you. A rose is a rose. But that doesn't make any difference if there has already been a determination by a Court that that constitutes a constitutional deprivation of due process.

THE COURT: So you're saying Propronick (phonetic) is not good law anymore? I can never pronounce that case. Proprodnick (phonetic). That that's not good law anymore? Because that says you need a deprivation of policy and the municipality of the actions must establish an unconstitutional municipal policy.

MR. POLLINGER: That's a different claim, if your Honor please.

THE COURT: That's 1983.

[16] MR. POLLINGER: But there are many many many bases for 1983 claims. And there are many many many bases for deprivations of due process or equal protection. And equal protection deprivation constitutes a 1983 claim.

(Tape #67 ends; Tape # 68 begins)

THE COURT: Wait, wait, wait, but you've got to be a protective class. And you're talking, if you're not a protective class then it's different. You've got different standards under New Jersey than under federal; you know that.

MR. POLLINGER: Every defendant in a — every defendant in a criminal or quasi-criminal case is in the same class. It has been judicially determined that the individual persons of the municipality of Fort Lee were guilty of constitutional violations of Mr. Benecke's procedural due process rights. The case is Fort Lee — or State of New Jersey vs. TCB Towing. The docket number is 89-0058. There is an Order signed by Judge Lucchi dated April 2, 1990, which found that there was no merit for any reversal of the dismissals. The dismissals were based upon violation of constitutional rights. That is a — is res judicata on the law. It is a finding of fact that was not appealed. The defendant had — they appealed to the Superior Court. They could [17] have gone to the Appellate Division if they didn't like that ruling. They didn't do that. They're stuck with it. And what they're stuck with are specific findings of violation of constitutional rights.

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THE COURT: Thank you. Mr. Saia.

MR. SAIA: Judge, I'd like to begin by focusing in on the facts of the case once again. Mr. Benecke did not have a license. Claims and — he did not complete the application in 1988 —

THE COURT: Now, you know we're being taped. I don't know if you're speaking loud enough with the air conditioner.

MR. SAIA: — as well as in 1989. The application was denied after the Boro attorney had informed the Council that a person who violates the ordinance repeatedly violates the ordinance should not be granted a license.

Now, Mr. Pollinger in it's argument has said that he is not going after the municipality because of anything they did. He's basing the claim against the municipality based upon respondeat superior. This is a 1983 action, your Honor. It is the only claim, as stipulated when we were here before that this is only a 1983 action. There is no other claim. Simply put, there is no respondeat superior under 42 U.S.C. 1983. I [18] cite to you the Monelle (phonetic) case. It's a United States Supreme Court decision. There is no respondeat superior.

Now, as we said —

THE COURT: You need a municipal policy. Don't you always need a —

MR. SAIA: You need an official municipal policy of a high or high level decision making activity towards the constitutional violation.

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Now Mr. Pollinger seems to believe that every constitutional violation —

THE COURT: Well, I think what he's saying in effect is that Fort Lee's out to get Benecke. Okay? In plain English, he's saying Fort Lee's out to get Benecke. Maybe Benecke made them mad as hell. Okay? That's a chicken and egg a lot of times in these situations.

MR. SAIA: There 's not —

THE COURT: But is there something here that gives rise to the cause of action?

MR. SAIA: There 's not one shred of evidence. You have — as stipulated last time we were here, you have a valid ordinance. Now, granted, Fort Lee has admitted their officers incorrectly, under the State vs. Ross case, did not have a deputy court clerk give the [19] oath. Now, the reason for that, under — is for an independent finding of probable cause. Now if we're going to rehash this all up, Mr. Benecke called Fort Lee and told them each time "I towed a car".

THE COURT: Okay, but we're talking summary judgment. We're talking summary judgment.

MR. SAIA: Exactly. Now, your Honor, this technical negligent action by the Boro of Fort Lee by their officers, by implementing a policy which Judge DeSheplo, the Boro of Fort Lee Judge, the Municipal Court Judge, prescribed, and still prescribes to this day, they were acting in accordance with that. There is no evidence to suggest that this was an intentional act. Mere negligence, your Honor, is not sufficient to give rise to a 1983

action, even if it's a constitutional violation. 1983 is an extreme remedy.

THE COURT: Well, let's take a hypothetical. We used to — I went to law school in the south in the sixties, and back there there were stories, you know, around about Alabama and no matter what a black guy did he couldn't get to vote, okay? Bad analogy. It's late in the day. I'm making bad ones. But clearly that's a constitutionally protected right.

In effect what I'm hearing Mr. Pollinger say, by the number of summonses, that no matter what Mr. [20] Benecke does, he's not going to get a license to tow in Fort Lee. That's what I'm hearing. And what I'm asking you —

MR. SAIA: He has a license.

THE COURT: Pardon?

MR. SAIA: He has a license. Right now he has a license. He is towing in Fort Lee, Judge.

Judge, this is a two-year situation. The first year, it's the most important thing, Judge, the first year, he did not complete his application. That is the most important thing. He did not get a license because he did not submit the application. During that year, Mr. Benecke, he doesn't have any damages. He towed. There is no question about it. He towed hundreds of times. And every time he towed, he called up Fort Lee and said "by the way, I towed".

THE COURT: The proverbial 500 arrests, no convictions. He had a good lawyer is what you're saying.

Appendix G

MR. SAIA: Now, Judge, after the 34 or so summonses were dismissed by the Bogota Court, Fort Lee was aware of the situation. Fine. We have to have a deputy clerk sign it. What did they do? They complied with that Order and issued the remaining summonses. Plain and simple. There is not a shred of evidence to [21] suggest conspiracy. They were enforcing a valid law. It's a valid ordinance as passed by the Boro.

Now, Judge, all of the determinations before the summonses were issued, there was no judicial determination that there was anything wrong with that, or that the procedure was wrong. Fort Lee in enacting the statute, as admitted, was enacting valid police powers. When the Bogota Court judge ruled no, we disagree with that because we're relying on State vs. Ross. As I cited in my response papers, Judge, that State vs. Ross simply has not withstood the time, challenge of time, because it does not make sense that for every ordinance, every traffic summons, that you're going to have to go back to the police station. This is like having an unlicensed dog. It's a summons. You don't get arrested and locked up. You don't get put in jail. You're not detained. This is not the type of ordinance —

THE COURT: It's not a deprivation of right — you're saying that just go back to the statute, there's no deprivation of right, privilege or immunity is what you're saying.

MR. SAIA: Exactly. Now there's been some talk here about the licensing itself and a constitution property interest. I assume based upon that our last argument, our last discussion, that it was conceded that [22] he did not have a property interest.

THE COURT: You're saying he's towing anyway so they're not taking away his privilege to tow.

MR. SAIA : He just kept on towing.

MR. POLLINGER: Not in 1989. Not one car.

THE COURT: Is there a privilege to tow? He doesn't have a right to tow, he doesn't have an immunity from prosecution. Does he have a privilege?

MR. SAIA: Absolutely not. He doesn't have a right in the license. It's an exercise of valid police power —

THE COURT: It's a valid licensing —

MR. SAIA: It's a licensing law.

Now, Judge, qualified immunity exists, plain and simple. It's a federally recognized immunity under 1983 claim. Particularly 1983 claims you find them. When an officer, and it's an objective standard, we're not going to submit any subjective affidavits, it just wouldn't make sense in this case, when you look at the activities of the officer, what were they doing? The were enforcing an ordinance as prescribed by the Municipal Court Judge. Nothing more. When a separate Municipal Court Judge disagreed with Fort Lee's Municipal Court Judge, they changed their way, they complied with that, and the next Judge says I find the [23] term tower or wrecker to be vague.

It still is a valid ordinance until that determination. And as such, they're entitled to qualified immunity.

THE COURT: I'm ready to give a decision. It's a harsh one, but I am going to grant summary judgment. I'm taking the facts in the light most favorable to plaintiff. And I'm reviewing the statute,

42 U.S. Code 1983, and I don't think I have to recite it, but it really does deal with rights, privileges and immunities and numerous cases in line. I just have two of them in front of me. One is City of Oklahoma City against Tuttle (phonetic) 471 U.S. 808, that's 1985. And City of St. Louis against Proprodnick (phonetic), that's — oh, I have the Supreme Court cite on that, if I could, that's 108 Supreme Court, 915, 1988. I don't have the U.S. cite.

But basically what the Courts do is look towards the actions of the municipal employees under respondeat superior, and look at those actions to see if the actions themselves could prove an existence of an unconstitutional municipal policy. And these cases, as well as the others, go into the nature of the actions, and the number of the actions. And I think if the more severe, the less that's required.

[24] What have we got here? We have a situation where yes, there was procedural due process, and the fact of for example, summonses given where signatures were wrong. We don't — and we're dealing — I would distinguish this case very strongly from the story that Mr. Pollinger told me; although if I were to be strict, I wouldn't even consider that. But I do feel that it's highly different. One was there was a right. The person was on a towing list. He had — there was a right. That individual was on a towing list. That individual had a right which was deprived. Here there is no right, privilege or immunity being deprived, one reason. Second reason is the nature of the defect and it just can't be that every time there is a procedural defect throwing out claims, even if they're in great number. That could not give rise to a 1983 cause of action. I'm satisfied that's not intended.

With regard to any conspiracy, I would point to Appellate Division case, Judge Brody's case, Hayes against Mercer County

(phonetic). And that's 217 N.J. Super 614, 1987. And talking in terms of qualified immunity, et cetera. And I'm satisfied that no way is 1983 intended to really open up or remove claims for — strike that — the immunities granted to municipal officials under situations where the procedural lack of [25] due process is of this nature, and not more severe than that. So I've got to grant summary judgment.

MR. SAIA: Thank you, your Honor.

MR. POLLINGER As to all issues, your Honor?

THE COURT: Yes.

MR. POLLINGER: All issues and all parties?

THE COURT: Yes.

(Matter concluded)

Appendix G

STATE OF NEW JERSEY)
) SS
COUNTY OF MIDDLESEX)

I, Sandra Carbonaro, assigned transcriber, do affirm that the foregoing is a true and accurate transcript, to the best of my ability, of the proceedings in the matter of Benecke v. Fort Lee, heard on May 31, 1991 in the Bergen County Superior Court, and recorded on Tape # 67, Index # 4770 to Index # 6926; and Tape # 68, Index # 001 to Index # 735 of that Court.

s/ Sandra Carbonaro
Sandra Carbonaro AOC# 259

August 19, 1991
New Jersey Transcription Service